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Auditing the PCAOB: A Test to the Accountability of the Uniquely Structured Regulator of Accountants

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I. INTRODUCTION

After a slew of highly publicized corporate accounting scandals during the early 2000s at prominent companies—including Enron, WorldCom, Adelphia, and Tyco—public confidence in the integrity of financial reporting by public companies was undoubtedly shaken.[1] Several major financial reporting frauds demonstrated serious weaknesses with the then self-regulated accounting profession, including the failure of auditors to detect those companies that were "cooking their books."[2] The collapse of several prominent companies not only affected top executives, who often were subjected to civil and criminal charges, but also produced harsh consequences for several other constituencies who relied on the integrity of the accounting firms to detect these discrepancies in financial reporting.[3] As one scholar phrased it: "The growing number of accounting and corporate governance scandals had sounded an alarm, which was made all the

1. *See* Penelope Patsuris, *The Corporate Scandal Sheet*, FORBES.COM, Aug. 26, 2002, http://www.forbes.com/2002/07/25/accountingtracker.html (providing a summary of corporate accounting scandals between 2000–2002, including several billion dollar overstatements).

2. Elliott J. Weiss, *Some Thoughts on an Agenda for the Public Company Accounting Oversight Board*, 53 DUKE L.J. 491, 492–93 (2003).

3. *See Enron, Executives Sued Over Pension Losses*, ST. PETERSBURG TIMES, June 27, 2003, http://www.sptimes.com/2003/06/27/news_pf/Business/Enron__exectives_sued.shtml (reporting on the Labor Department's lawsuit against Enron and its former executives and directors for mismanagement of employee retirement plans).

more deafening by the staggering sums of money lost by shareholders, employees, and retirees of the companies involved."[4]

Reacting swiftly to the public concern, Congress passed landmark legislation in 2002. Congress designed the Sarbanes-Oxley Act ("SOX") to regulate the conduct of public accounting firms and to revive investors' confidence in the integrity of public companies' financial reporting and disclosures.[5] After signing SOX into law, President George W. Bush declared that SOX included some of "the most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt."[6]

SOX represented a radical departure from the previously self-regulated accounting profession. As a central part of SOX, Congress created the Public Company Accounting Oversight Board ("PCAOB") and provided it with extensive authority to ensure that SOX's lofty objectives were met.[7] Among the PCAOB's significant powers and responsibilities is the authority to promulgate rules and regulations governing the standards and issuance of audit reports, to conduct inspections and investigations of registered public accounting firms, and to impose monetary sanctions on registered firms for noncompliance with its standards.[8]

Determined to facilitate public confidence in the integrity of public company accounting oversight, Congress purposefully insulated its new regulatory entity from political influence.[9] Central to the PCAOB's independence are the limitations on the appointment and removal of its members. SOX vests the power of appointment and removal of PCAOB members with the commissioners of the Securities and Exchange Commission ("SEC") and limits the commissioners' ability to remove the PCAOB members except "for good cause shown."[10] The commissioners, in turn, are removable by the President

4. Donna M. Nagy, *The SEC at 70: Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 996 (2005). Audit failures reportedly cost investors nearly half a trillion dollars in 2001. Brief for Appellees Public Co. Accounting Oversight Bd. et al. at 1, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667 (D.C. Cir. 2008) (No. 07-5127).

5. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

6. Elisabeth Bumiller, *Bush Signs Bill Aimed at Fraud in Corporations*, N.Y. TIMES, July 31, 2002, at A1.

7. 15 U.S.C. § 7211(a) (2006).

8. *Id.* §§ 7211(c)(1)–(7).

9. *See infra* Part II.A.3 (discussing Congress's intent to provide the PCAOB with substantive independence from political pressure).

10. 15 U.S.C. §§ 7211(e)(4)(a), (6).

only for "neglect of duty or malfeasance in office."[11] Congress, therefore, created a novel "double for-cause limitation on removal," where the restriction on the PCAOB's removal passes through two levels of control.[12] The constitutionality of this structure, in which the President's power to remove an officer of the executive branch is restricted by two "for-cause" limitations, has never been tested in any court prior to a recent challenge to SOX.[13]

The PCAOB's substantial independence from political interference prompted the Free Enterprise Fund, a non-profit public interest group that promotes economic growth and limited government, to challenge the constitutionality of the PCAOB.[14] The Free Enterprise Fund sets forth two main arguments for why SOX's provisions governing appointment and removal of the PCAOB are unconstitutional.[15] First, it argues that SOX violates the Appointments Clause because the PCAOB members are "principal officers" who must be nominated by the President, not the SEC commissioners.[16] It believes that the members of the PCAOB are principal officers because of their extensive power granted through SOX and the lack of SEC oversight of their operations.[17] Second, the Free Enterprise Fund argues that the structure of the PCAOB violates the principle of separation of powers because the double for-cause limitation on removal unconstitutionally restricts the President's power to remove federal officers.[18] The Free Enterprise Fund believes the two levels of for-cause removal restrictions unconstitutionally interfere with the President's ability to carry out his constitutional mandate to "take care that the Laws be faithfully executed."[19]

After a district court decision and a split of opinion at the D.C. Circuit, the constitutionality of the PCAOB remains uncertain. The

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11. *Id.* § 2053(a).

12. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 679 (D.C. Cir. 2008) (acknowledging that the challenge to this type of removal structure was a "question of first impression"), *cert. granted*, 129 S. Ct. 2378 (U.S. May 18, 2009) (No. 08-861).

13. *Id.*

14. *Id.* at 670.

15. *Id.* at 668–70.

16. *See* U.S. CONST. art. II, § 2, cl. 2 (giving the President the power to appoint, along with the advice and consent of the Senate, "Officers of the United States"); *Free Enter. Fund*, 537 F.3d at 668–69 (explaining appellant's argument that only the President should have the power to appoint PCAOB board members, presuming their status as principle officers under the Appointments Clause).

17. *Free Enter. Fund*, 537 F.3d at 672.

18. *Id.* at 679.

19. *Id.*; *see also* U.S. CONST. art. II, § 3 (commonly referred to as the "Take Care Clause").

District Court for the District of Columbia found the PCAOB's appointment and removal structures constitutional—a victory for the PCAOB.[20] On appeal to the District of Columbia Circuit, the three-judge panel recognized the challenge to the constitutionality of a double for-cause limitation on removal as a matter of first impression.[21] In fact, the court acknowledged that "[n]either [it] nor the PCAOB nor the United States as intervenor has located any historical analogues for this novel structure."[22] Two of the three panel judges of the D.C. Circuit affirmed the District Court's order.[23] Judge Kavanaugh, however, strongly dissented in favor of the PCAOB, labeling this recent challenge as "the most important separation-of-powers case regarding the President's appointment and removal powers to reach the courts in the last 20 years."[24] Fortunately, the Supreme Court granted certiorari to review this important test to two of the President's most essential powers. The case will be heard during the October 2009 Term.[25]

This Note analyzes SOX's provisions governing the appointment and removal of the PCAOB and reconciles the differing interpretations of the Appointments Clause and the principle of separation of powers as they pertain to the PCAOB. Part II provides background on SOX and case law relevant to the constitutional challenges at issue in *Free Enterprise Fund v. Public Company Accounting Oversight Board.* Part III sets forth competing interpretations of the Appointments Clause and separation of powers jurisprudence. It explains the positions of the challengers to and supporters of SOX, and how they apply their respective interpretations of Supreme Court precedent to debate the constitutionality of the PCAOB.

Part IV reconciles these differing interpretations and provides a solution to the constitutional challenges to the PCAOB. Part IV first

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20. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., No.06-0217, 2007 WL 891675, at *4–6 (D.D.C. Mar. 21, 2007). Several amici curiae were written on behalf of the Free Enterprise Fund and the PCAOB, respectively, and the United States stepped in as intervener for the PCAOB. *See, e.g.*, Brief of Amicus Curiae Council of Institutional Investors in Support of Defendants-Appellees and Urging Affirmance, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667 (D.C. Cir. 2008) (No. 07-5127) [hereinafter Institutional Investors Brief].

21. *Free Enter. Fund*, 537 F.3d at 697–98.

22. *Id.* at 699 (Kavanaugh, J., dissenting).

23. *Id.* at 668–69 (majority opinion).

24. *Id.* at 685 (Kavanaugh, J., dissenting).

25. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 129 S. Ct. 2378 (2009).

explains that, notwithstanding any preliminary obstacles to reaching the constitutional issues, the significant constitutional safeguards to government accountability at stake, as well as the presence of investor uncertainty, necessitate a resolution of the constitutional issues. It then proposes that the PCAOB members are inferior officers, and therefore their appointment is constitutional, because the SEC maintains "veto power" over the PCAOB's most critical powers. Notwithstanding this determination, Part IV argues that the Supreme Court should nonetheless find the PCAOB's removal structure unconstitutional. It discusses why the double for-cause removal restriction on the PCAOB both excessively attenuates the President's ability to see that the laws are faithfully executed and draws power to Congress over the execution of the laws. Part IV urges the Supreme Court not to take a step down the "slippery slope" in permitting an unprecedented congressional encroachment on the President's removal authority.

II. BACKGROUND: SOX AND SELECTED CASE LAW ON THE APPOINTMENTS CLAUSE AND THE PRINCIPLE OF SEPARATION OF POWERS

This Part provides background information on SOX and the case law leading to the conflict in *Free Enterprise Fund v. Public Company Accounting Oversight Board*. Section A discusses the authority granted to the PCAOB and the SEC's oversight of this regulatory body, which provides the context for the respective arguments under the Appointments Clause and the principle of separation of powers. Section B discusses the Appointments Clause and relevant case law on the distinction between principal and inferior officers. Section C discusses the principle of separation of powers and congressional limitations on the President's removal power.

A. SOX and Its Creation of the PCAOB

Prior to the enactment of SOX in 2002 and its creation of the PCAOB, the accounting profession was largely self-regulated, with the profession's trade associations establishing their own accounting principles and auditing standards.[26] In the aftermath of accounting misconduct that captured front-page headlines and resulted in major

26. *See* Institutional Investors Brief, *supra* note 20, at 3–10 (providing a history of the self-regulatory system of the accounting profession).

collapses at several prominent public companies, Congress reacted with consequential legislation.[27] After several congressional committee hearings and debates in both houses of Congress and more than thirty proposed bills, Congress passed SOX by an overwhelming majority in both houses.[28]

The purpose of SOX is to develop regulatory procedures that bolster public confidence in the integrity of public accounting firms and the public companies for which they issue and certify audit reports.[29] At the center of SOX, Congress created a new regulatory authority—the PCAOB—charged with protecting the interests of investors and facilitating the preparation of accurate and independent audit reports of public companies.[30]

1. The Structure of the PCAOB and Its Authority

Congress created the PCAOB as a nonprofit corporation to carry out the objectives of SOX.[31] The PCAOB consists of five members who are appointed for five-year terms by the commissioners of the SEC.[32] The PCAOB members are removable only "for good cause shown" by the commissioners of the SEC.[33] The commissioners, in turn, are only removable by the President for cause.[34] This structure hence constitutes the double for-cause restriction on the removal of the members of the PCAOB.

SOX grants the PCAOB broad regulatory authority over accounting firms engaged in the business of auditing publicly traded companies.[35] SOX requires public accounting firms to register with the PCAOB, making it unlawful for any non-registered public accounting firm to prepare or issue any audit report with respect to any public company.[36] Congress delegated to the PCAOB broad powers to adopt

27. *See* Nagy, *supra* note 4, at 977 (noting that Congress enacted the PCAOB in direct response to the collapse of prominent public companies). Audit failures reportedly cost investors nearly half a trillion dollars in 2001. Brief for Appellees, *supra* note 4, at 1.

28. *See* Nagy, *supra* note 4, at 1001, 1006 (summarizing the hearings and debates that led to the passage of the SOX bill).

29. Weiss, *supra* note 2, at 492.

30. 15 U.S.C. § 7211(a) (2006).

31. *Id.*; *see also* Nagy, *supra* note 4, at 1031 (concluding that notwithstanding Congress's designation of the PCAOB as a private nonprofit corporation, the PCAOB is a "state actor" and a public entity in light of Supreme Court precedent).

32. 15 U.S.C. §§ 7211(e)(1), (4), (5).

33. 15 U.S.C. §§ 7211(6), 7217(d)(3).

34. *Id.* § 78(d).

35. *See id.* § 7211(c) (outlining the broad authority delegated to the PCAOB).

36. *Id.* § 7212(a).

and implement rules in accordance with SOX, including auditing and attestation standards, quality control standards, ethics standards, and auditor-independence requirements.[37]

SOX also grants the PCAOB the authority to conduct inspections of registered firms and to initiate investigations of any conduct that may violate SOX or related accounting oversight rules.[38] The PCAOB may initiate disciplinary proceedings for a registered firm's failure to cooperate with an investigation.[39] If the PCAOB finds a violation of SOX, PCAOB-promulgated rules, or securities laws, it "may impose such disciplinary or remedial sanctions as it determines appropriate," including suspension or revocation of registration or a civil monetary penalty.[40] SOX further empowers the PCAOB to assess an "annual accounting support fee" on the nation's public companies pursuant to its own standards.[41]

2. SEC Oversight

Subject to certain restrictions, SOX provides the SEC commissioners with some degree of oversight of the PCAOB.[42] SOX grants the commissioners the power to appoint and remove PCAOB members, except that removal must only be for good cause shown.[43] SOX further narrows the definition of "good cause shown" to instances where a Board member has (1) willfully violated SOX or related rules, (2) willfully abused his or her authority, or (3) unjustifiably failed to enforce compliance of the public company accounting rules.[44]

SOX mandates that no proposed rule of the PCAOB shall become effective without prior approval of the SEC, following its notice-and-comment procedures.[45] The SEC may abrogate, delete from, or add to PCAOB-promulgated rules,[46] and it may relieve the

37. *Id.* § 7213(a)(1).

38. *Id.* §§ 7214(a), 7215(b)(1).

39. *Id.* § 7215(c)(1).

40. *Id.* §§ 7215(c)(4)(A), (D).

41. *Id.* § 7219(d). The Free Enterprise Fund indicates in its brief that the PCAOB has collected this tax from approximately 10,000 companies. Brief of Appellants at 6, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667 (D.C. Cir. 2008) (No. 07-5127).

42. *See* 15 U.S.C. § 7217 (2006) (outlining the SEC commissioners' oversight responsibility).

43. *Id.* §§ 7211(e)(4), (6).

44. *Id.* § 7217(d)(3).

45. *Id.* §§ 7217(b)(2), (4) (incorporating 15 U.S.C. § 78s(b)).

46. *Id.* § 7217(b)(5).

PCAOB of its enforcement authority.[47] The PCAOB must conduct inspections under rules approved by the SEC and submit inspection reports for SEC review upon request.[48] The SEC may also modify PCAOB-imposed sanctions if it finds them inappropriate."[49]

3. The PCAOB's Political Independence

After considering several alternative proposals for strengthening the supervision of the accounting profession in response to the corporate scandals in the early 2000s, Congress ultimately created the PCAOB and intentionally insulated this new regulatory entity from political pressure. A central purpose of SOX is the creation of an accounting oversight board that is substantially independent from the President, the SEC, and other political influences.[50] Senator Sarbanes, one of the most influential legislators in the adoption of SOX, insisted that "[w]e need to establish this oversight board . . . to provide an extra guarantee of its independence . . . ."[51] Congress structured the PCAOB to evade the "extraordinary amount of political pressure [that] was [previously] brought to bear on the [SEC]" when it attempted to limit accounting firms' capabilities of performing both audit and consulting services.[52]

Congress's intent to insulate the PCAOB from political pressure is evident from the chosen form of the entity as a nonprofit corporation with substantial regulatory authority, whose members are appointed by and removable by members of an independent agency only "for good cause."[53] The "massive, unchecked powers" of the PCAOB, accompanied with the lack of SEC oversight and the double for-cause removal structure prompted the Free Enterprise Fund to

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47. *Id.* §§ 7217(d)(1)–(2).

48. *Id.* §§ 7214(c)–(h).

49. *Id.* §§ 7217(c)(1), (3).

50. *See, e.g.*, 148 CONG. REC. 12,119 (2002) (statement of Sen. Gramm) ("This Board is going to have massive power, unchecked power, by design.").

51. *Id.* (statement of Sen. Sarbanes).

52. Michael A. Carvin, Noel J. Francisco & Christian G. Vergonis, Practitioner Note, *Massive, Unchecked Power by Design: The Unconstitutional Exercise of Executive Authority by the Public Company Accounting Oversight Board*, 4 N.Y.U. J.L. & BUS. 199, 203–04 (2007) (quoting *Accounting Reform and Investor Protection: Hearings on the Legislative History of the Sabanes-Oxley Act of 2002: Accounting Reform and Investor Protection Issues Raised by Enron and Other Public Companies Before the S. Comm. on Banking, Housing and Urban Affairs*, 107th Cong. 15 (2002) (statement of Arthur Levitt, former chairman of the SEC)).

53. 15 U.S.C. §§ 7211(a), (c), (e).

challenge the PCAOB's constitutionality under the Appointments Clause and the principle of separation of powers.[54]

B. The Power of Appointment

One of the primary challenges to the PCAOB's structure is that it violates the Appointments Clause because its members are principal officers who must be appointed by the President, as opposed to the commissioners of the SEC. This Section sets forth the text of the Appointments Clause and the Framers' interpretation of the President's appointment power. This Section also discusses selected case law on the distinction between principal and inferior officers, which in turn determines to whom Congress may grant the power of appointment of such officers.

1. The Appointments Clause and the Framers' Understanding

Under Article II of the Constitution, the Framers explicitly delegated the primary power of appointment of federal officers to the President.[55] Article II, § 2, cl. 2, commonly referred to as the "Appointments Clause," states:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[56]

Debates over the Appointments Clause at the Constitutional Convention focused on maintaining accountability for appointments and providing a check on concentrated power.[57] To promote government accountability, the Framers deemed the President to be the "security fit for appointments" and structured the power of appointment to prevent Congressional encroachment on the executive branch.[58] The Supreme Court has described the structure of the

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54. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 668 (D.C. Cir. 2008).

55. U.S. CONST. art. II, § 2, cl. 2.

56. *Id.*

57. Note, *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914, 1917 (2007) [hereinafter *Congressional Restrictions*].

58. Edmond v. United States, 520 U.S. 651, 659 (1997); *Congressional Restrictions*, *supra* note 57, at 1918; *see also* Buckley v. Valeo, 424 U.S. 1, 128–31 (1976) (explaining that the

Appointments Clause as "among the significant structural safeguards of the constitutional scheme."[59]

Although the Framers granted the President the sole power to nominate principal officers, the Constitution also contemplates an active role for the legislative branch. The Appointments Clause requires the appointment of principal officers be made only with the advice and consent of the Senate.[60] The Clause also authorizes Congress to vest the appointment of certain officers in persons other than the President.[61] Alexander Hamilton observed that the joint participation of the President and the Senate would further promote public accountability, explaining: "The blame of a bad nomination would fall upon the president singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate."[62]

2. The Distinction between Principal and Inferior Officers under the Appointments Clause

As confirmed by the Supreme Court, the Appointments Clause establishes three categories of federal officials: principal officers, inferior officers, and employees.[63] Employees are federal officials who are not considered to be "officers" of the United States because they do not exercise "significant authority" pursuant to the laws of the United States.[64] Because the Constitution only contemplates the appointment of "Officer[s] of the United States," a federal official who fits within the employee category need not be appointed in a manner prescribed by the Appointments Clause.[65] As described in the preceding Section, principal officers may be appointed only by the President with the advice and consent of the Senate.[66] This prescribed manner of appointment for principal officers is also the default manner for the appointment of inferior officers.[67] However, the plain text of the

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debates of the Constitutional Convention are "replete with expressions of fear that the Legislative Branch . . . will aggrandize itself at the expense of the other two branches").

59. *Edmond*, 520 U.S. at 659.

60. U.S. CONST. art. II, § 2, cl. 2.

61. *Id.*

62. THE FEDERALIST NO. 77, at 392 (Alexander Hamilton) (M. Beloff ed. 1987).

63. *Congressional Restrictions*, *supra* note 57, at 1916 (citing *Buckley*, 424 U.S. at 125–26 & n.162).

64. *Buckley*, 424 U.S. at 126.

65. U.S. CONST. art. II, § 2, cl. 2; *see also Buckley*, 424 U.S. at 126 n.162 (explaining that not all employees of the United States are Article II "officers").

66. U.S. CONST. art. II, § 2, cl. 2.

67. Edmond v. United States, 520 U.S. 651, 660 (1997).

Appointments Clause grants Congress the option of vesting the appointment of inferior officers in persons other than the President, including the "Courts of Law" or "Heads of Departments."[68] This provision of the Constitution, commonly referred to as the "Excepting Clause," was established primarily for administrative convenience, as the Framers could foresee that the proscribed manner of appointment would become inconvenient when offices became numerous.[69]

Unlike the President's removal power, few Supreme Court cases provide guidance on the distinction between principal and inferior officers under the Appointments Clause.[70] The dearth of cases addressing this distinction is likely explained by the text of the Appointments Clause and the history of the appointment of federal officers.[71] Congress has often placed the power of appointment of federal officers in the President, which is clearly allowed under the text of the Appointments Clause, regardless of whether the officer is principal or inferior. Moreover, when Congress historically has provided for the appointment of an officer by the head of a department, it has been fairly clear that the officer was inferior since the head of the department could remove the inferior officer at will.[72]

Although Supreme Court precedent on the Appointments Clause is not as extensive as its jurisprudence on other executive powers, the Court has provided some guidance for determining whether a federal official is a principal or inferior officer. In *Morrison v. Olson*, the Supreme Court held that the provision of the Ethics in Government Act vesting the appointment of independent counsel in the Special Division of the U.S. Court of Appeals for the D.C. Circuit did not violate the Appointments Clause.[73] The Court did not attempt to establish a clear test on the distinction between principal and inferior officers because, in its view, the independent counsel "clearly falls on the 'inferior officer' side of that line."[74] The Court did,

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68. U.S. Const. art. II, § 2, cl. 2; *Edmond*, 520 U.S. at 660.

69. *Edmond*, 520 U.S. at 660; United States v. Germaine, 99 U.S. 508, 510 (1879).

70. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 705 (D.C. Cir. 2008) (Kavanaugh, J., dissenting); *see also In re* Sealed Case, 838 F.2d 476, 481 (D.C. Cir. 1988) ("Two hundred years after the adoption of the United States Constitution the federal courts are, essentially for the first time, required to construe closely the appointments clause of Article II."). The Note discusses the President's removal power *infra* Part II(c)(2).

71. *Free Enter. Fund*, 537 F.3d at 705 (Kavanaugh, J. dissenting).

72. *Id.*

73. 487 U.S. 654, 677 (1988) (finding for the government both on the "principal versus inferior officer" question and on Congress's limited power to provide for "interbranch appointments").

74. *Id.* at 671.

however, provide several factors leading to its conclusion that the independent counsel is an inferior officer within the meaning of the Appointments Clause.[75] First, the fact that the attorney general could remove the independent counsel indicated at least some degree of inferiority in rank, even though the officer possessed some independent discretion to exercise her delegated powers.[76] Second, the Act empowered the officer to perform only "certain, limited duties," and the officer specifically did not possess authority to formulate policy for the executive branch.[77] Third, the independent counsel's authority was limited in jurisdiction, and its office was "temporary in the sense that an independent counsel is appointed essentially to accomplish a single task."[78]

Building on *Morrison*, the Supreme Court most recently analyzed the distinction between principal and inferior officers in *Edmond v. United States*.[79] The Court concluded that the judges of the Coast Guard Court of Criminal Appeals were inferior officers and, therefore, their appointments by the Secretary of Transportation were constitutional.[80] In reaching its conclusion, the Court insisted that its prior Appointment Clause jurisprudence, including *Morrison*, had not set forth an exclusive criterion for distinguishing between principal and inferior officers.[81] The Court went on to delineate a more authoritative test, stating, "[T]he term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President."[82] It further defined "inferior officers" as "officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate."[83] The "directed and supervised" test continues to provide a basis for determining officer status under the Appointments Clause.

Several methods of oversight weighed in favor of the *Edmond* judges' classification as inferior officers. The Judge Advocate General

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75. *Id.* at 671–73. The Court also indicated that the Framers provided little guidance to distinguish between principal and inferior officers and that the line distinguishing them "is one that is far from clear." *Id.* at 671.

76. *Id.*

77. *Id.* at 671–72 ("An independent counsel's role is restricted primarily to investigation and, if appropriate, prosecution for certain federal crimes.").

78. *Id.* at 672.

79. 520 U.S. 651, 658–66 (1997).

80. *Id.* at 666.

81. *Id.* at 661; *see also* Morrison v. Olson, 487 U.S. 654, 671 (1988) ("We need not attempt here to decide exactly where the line falls between the two types of officers . . . .").

82. *Edmond*, 520 U.S. at 662.

83. *Id.* at 663.

and the U.S. Court of Appeals for the Armed Forces supervised the work of the Coast Guard judges.[84] The Judge Advocate General maintained the power to remove a Coast Guard judge from his judicial assignment without cause.[85] Notwithstanding several limitations on the Judge Advocate General and Court of Appeals' control over the judges' work, the Court emphasized that the judges "have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers."[86]

C. Separation of Powers and the President's Removal Power

Another strong challenge to the PCAOB structure is that the double for-cause limitation on removal violates separation of powers principles because it burdens the President's ability to faithfully execute the laws. This Section discusses the principle of separation of powers and the emphasis the Framers placed on it as a constitutional safeguard. It also sets forth case law discussing the principle in the context of congressional limitations on the President's removal authority.

1. The Framers' Emphasis on the Principle of Separation of Powers and the Unitary Executive

Although not expressly provided for in the Constitution, the Framers implicitly included the principle of separation of powers in the first three articles of the Constitution.[87] The Supreme Court has recognized that "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787."[88] The Framers took great care to ensure that the governmental powers were separated into three branches, and that checks and

84. *Id.* at 664.

85. *Id.*

86. *Id.* at 664–65. The Court notes several limitations on the supervision of the judges, including a prohibition on the Judge Advocate General's attempt to influence the outcome of individual proceedings and a narrower scope of review by the Court of Appeals for the Armed Forces than that exercised by the Coast Guard Court of Criminal Appeals. *Id.*

87. *See e.g.*, Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co., 337 U.S. 582, 591 (1949) (citing Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934) ("Behind the words of the constitutional provisions are postulates which limit and control.")).

88. Buckley v. Valeo, 424 U.S. 1, 124 (1976).

balances existed among the three branches.[89] The Framers relied on Montesquieu's well-known maxim that a government should largely separate the executive, legislative, and judicial powers from one another.[90] James Madison elaborated on the significance of this structure: "[I]f there is a principle in our constitution, indeed in any free constitution, more sacred than another, it is that which separates the legislative, executive and judicial powers."[91]

Article II of the Constitution is clear in prescribing that "[t]he executive Power shall be vested in a President of the United States of America."[92] The Framers also granted the President the sole authority to "take Care that the Laws be faithfully executed."[93] From these clauses and the debates during the Constitutional Convention, the Framers' intent to create a strong, unitary executive, who is accountable to the public, is well-documented.[94] Although the President must execute the laws with the aid of subordinates, the Framers chose to vest the executive authority in a single person "in order to focus, rather than to spread, Executive responsibility thereby facilitating accountability."[95]

2. The President's Removal Power and Congressional Limitations

While the Appointment Clause in Article II expressly provides the procedure for the appointment of federal officers, the Constitution does not include any express provisions regarding the removal of officers, except for the removal from office by impeachment.[96] The Supreme Court, however, has concluded that the President's plenary executive power includes "the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed."[97] Although the Supreme Court upheld congressional limitations on the President's removal

89. Free Enter. Fund, v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 688 (D.C. Cir. 2008) (Kavanaugh, J. dissenting).

90. *See Buckley*, 424 U.S. at 120–21 (discussing the Framers' intent for separation of powers).

91. 1 ANNALS OF CONG. 604 (Joseph Gales ed., 1834).

92. U.S. CONST. art. II, § 1, cl. 1.

93. *Id.* art. II, § 3.

94. Myers v. United States, 272 U.S. 52, 116–17 (1926).

95. Clinton v. Jones, 520 U.S. 681, 712 (1997) (Breyer, J., concurring).

96. *Myers*, 272 U.S. at 109–10. The provision regarding removal of officers by impeachment is located in U.S. CONST. art. II, § 4.

97. Buckley v. Valeo, 424 U.S. 1, 136 (1976) (quoting *Myers*, 272 U.S. at 163–64).

power in certain situations,[98] the power to retain some degree of removal over federal officers who do not remain faithful to the President's direction is necessary to the President's execution of the laws.[99]

In a highly detailed opinion by then-Chief Justice and former President Taft, the Supreme Court in *Myers v. United States* addressed the constitutionality of a statute requiring Senate approval of the President's decision to remove a federal officer.[100] Finding the statute unconstitutional, the Court insisted that the President's removal power is "essential to the execution of the laws" such that "[t]he moment that he loses confidence in the intelligence, ability, judgment, or loyalty of any [subordinate], he must have the power to remove him without delay."[101] In reaching its conclusion, the Court relied on the Framers' original understanding of the President's removal power, and also on the fact that the executive power was given in general terms, whereas Congress's powers were specifically enumerated.[102] The Court endorsed a broad presidential removal power, finding "[t]he power of removal [to be] incident to the power of appointment, not to the power of advising and consenting to appointment."[103]

This broad endorsement to the President's removal power continues to have validity today with respect to its prohibition against any direct congressional involvement in the removal of executive officers.[104] For example, the Court invalidated a statute in *Bowsher v. Synar* that allowed Congress to remove the comptroller general.[105] This structure violated the principle of separation of powers by reserving a right for Congress to execute the laws through its removal authority.[106] Although *Myers* and *Bowsher* called for heavy suspicion of congressional limitations on removal, the Supreme Court's

98. *See infra* text accompanying notes 107–19 (discussing Morrison v. Olson, 487 U.S. 654 (1988) and Humphrey's Ex'r v. United States, 295 U.S. 602 (1935)).

99. *Myers*, 272 U.S. at 117, 123–25.

100. *Id.* at 107. The statute provided, "Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate . . . ." *Id.* (quoting 19 Stat. 80, 81, c. 179 (1876)).

101. *Id.* at 117, 134.

102. *Id.* at 115–23.

103. *Id.* at 122.

104. Bowsher v. Synar, 478 U.S. 714, 726 (1986). The continuing validity of this holding was recognized by the dissenting judge in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 537 F.3d 667, 694 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

105. 478 U.S. at 732–34.

106. *Id.*

interpretation of the removal power must be read in light of its subsequent decisions in *Humphrey's Executor v. United States*[107] and *Morrison v. Olson*.[108]

In *Humphrey's Executor*, the Supreme Court narrowed its expansive interpretation of the President's removal power. Here, the Court faced a constitutional challenge to the Federal Trade Commission Act, which limited the President's power of removal over the principal officers to "inefficiency, neglect of duty, or malfeasance in office."[109] The Court concluded that requiring the members of the Federal Trade Commission to be removable at will by the President would frustrate Congress's intent that the Commission be "free from 'political domination or control.' "[110] The Court found it "plain" that the President does not possess "illimitable power of removal" and that Congress retains the authority, in certain circumstances, to limit the removal of principal officers except for cause.[111] Rather than overruling *Myers*, however, the Court narrowed its holding to the removal of "purely executive officers."[112] According to *Humphrey's Executor*, the constitutionality of congressional limitations on the President's removal power "depend[s] upon the character of the office."[113] Further, the Court expressly left the question of the constitutionality of other removal limitations for future consideration.[114]

Expanding on its decision in *Humphrey's Executor*, the Court in *Morrison v. Olson* upheld a "good cause" restriction on the removal of an inferior officer by the head of a department who was removable by the President at will.[115] Rather than the "character of the office" inquiry set forth in *Humphrey's Executor*, however, the Court

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107. 295 U.S. 602 (1935).

108. 487 U.S. 654 (1988).

109. 295 U.S. at 623.

110. *Id.* at 625 (quoting the "prevailing view" of both houses of Congress that the Commission "be 'separate and apart from any existing department of the government — not subject to the orders of the President' ").

111. *Id.* at 629.

112. *Id.* at 631–32.

113. *Id.*

114. *Id.* at 632 ("To the extent that, between the decision in the Myers Case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt . . . .").

115. 487 U.S. 654, 691 (1988) (quoting 28 U.S.C. § 596(a)(1) (Supp. V 1982) (authorizing removal "other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of [the officer's] duties")).

reasoned that "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."[116] The Court first concluded that the imposition of a "good cause" standard of removal over an inferior officer alone did not impermissibly burden the President's power to control the officer in the execution of his duties.[117] The statute did not "completely strip" the President's removal power because the President, through the attorney general, retained sufficient authority to ensure that the inferior officer competently performed his duties in accordance with the enabling statute.[118] Lastly, the Court concluded that the statute as a whole did not prevent the President from accomplishing his constitutional mandate to faithfully execute the laws.[119] Thus, as these cases demonstrate, the Court has upheld congressional limitations on the President's removal power under certain circumstances.

III. SAME LAW, DIFFERENT CONCLUSIONS: DEBATING THE CONSTITUTIONALITY OF THE PCAOB

Based on the significant authority granted to the PCAOB and the lack of SEC oversight, the Free Enterprise Fund recently challenged the constitutionality of the PCAOB under the Appointments Clause and the principle of separation of powers.[120] The Free Enterprise Fund was joined in the suit by one of its members, the Nevada accounting firm of Beckstead & Watts, which has been the subject of ongoing formal investigation by the PCAOB since 2004.[121] The parties sought an order enjoining any further action against Beckstead & Watts and a judgment declaring SOX's provisions governing the appointment and removal of PCAOB members

116. *Id.* at 691.

117. *Id.* at 691–92.

118. *Id.* at 692.

119. *Id.* at 692–96; *see also* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977) ("[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.").

120. Brief of Appellants, *supra* note 41, at 1. The plaintiffs also claimed that SOX violated the non-delegation doctrine; however, this claim was omitted on appeal. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 670 n.2 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 2378 (U.S. May 18, 2009) (No. 08-861).

121. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., No.06-0217, 2007 WL 891675, at *2 (D.D.C. Mar. 21, 2007), *aff'd*, 537 F.3d 667, *cert. granted*, 129 S. Ct. 2378.

unconstitutional.[122] The United States acted as intervenor to defend the constitutionality of the PCAOB,[123] and several briefs as amici curiae were submitted in support of both parties.[124]

Siding with the PCAOB, the federal district court held both that the PCAOB members were inferior officers and that its removal restrictions did not violate the principle of separation of powers.[125] Interpreting the PCAOB's appointment and removal structures to be within the bounds of Supreme Court precedent, the court found the plaintiffs' arguments "colorable but ultimately unsuccessful."[126] On appeal to the District of Columbia Circuit, two of the three judges on the panel voted to affirm the District Court's judgment and uphold the constitutionality of the PCAOB.[127] Judge Kavanaugh, however, strongly dissented, urging that the PCAOB's structure violated both the Appointments Clause and the principle of separation of powers.[128] Ultimately, the Supreme Court will decide whose argument is stronger when it hears the Free Enterprise Fund's challenge during the October 2009 Term.

A. The Challengers' View: The PCAOB's Structure Violates the Constitution

1. Violation of the Appointments Clause

A primary issue regarding the PCAOB's constitutionality is whether its appointment structure violates the Appointments Clause, which turns on whether its members are principal officers who must be appointed by the President.[129] The Free Enterprise Fund, Beckstead & Watts, Judge Kavanaugh of the D.C. Circuit, and other commentators (collectively "the Challengers") argue that *Edmond v. United States*[130] provided a definitive test for determining officer status, and that the members of the PCAOB are principal officers

122. *Free Enter. Fund*, 2007 WL 891675, at *1–2.

123. Brief for the United States at 3, *Free Enter. Fund*, 537 F.3d 667 (No. 07-5127).

124. *See, e.g.*, Brief of Amicus Curiae Washington Legal Foundation in Support of Plaintiffs-Appellants Free Enterprise Fund and Beckstead and Watts, LLP Urging Reversal at 2, *Free Enter. Fund*, 537 F.3d 667 (No. 07-5127) (urging reversal with a primary focus on the removal issue) [hereinafter Washington Legal Foundation Brief].

125. *Free Enter. Fund*, 2007 WL 891675, at *5–6.

126. *Id.* at *3.

127. *Free Enter. Fund*, 537 F.3d at 685.

128. *Id.* at 686–87, 715 (Kavanaugh, J., dissenting).

129. Brief of Appellants, *supra* note 41, at 31.

130. 520 U.S. 651 (1997).

pursuant to this test.[131] *Edmond* states that inferior officers are "officers whose work is *directed and supervised* at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[132] From this language, Judge Kavanaugh derived a "directed and supervised" test to determine officer status.[133]

The Free Enterprise Fund and Beckstead & Watts advocate that the "effective discipline through the power of removal" is a necessary component of the directed and supervised test.[134] Judge Kavanaugh reasons that, because *Edmond* and other relevant precedent have recognized the power of removal as a "powerful tool for control," the most important factor in determining an officer's status is whether the officer is removable at will.[135] The Challengers also argue that *Morrison*[136] is distinguishable because the officer had limited jurisdiction, and because the office was temporary.[137] In contrast, SOX grants the members of the PCAOB extensive authority over the public accounting profession and the Board continues in existence until dissolved by an act of Congress.[138]

In addition to the removal component of the analysis, the authority of a superior officer to guide the inferior officer's actions "through ongoing, day-to-day supervision" from the outset comprises another essential part of the test.[139] Indeed, Judge Kavanaugh finds the authority of a superior other than the President to "affirmatively command" the ongoing conduct of an officer as the only saving grace to inferior officer status, other than the power to remove the officer at will.[140] He purports that officers not removable at will ordinarily are inferior officers only if:

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131. *Free Enter. Fund*, 537 F.3d at 687 (Kavanaugh, J., dissenting); Brief of Appellants, *supra* note 41, at 31.

132. 520 U.S. at 663 (emphasis added).

133. *Free Enter. Fund*, 537 F.3d at 706 (Kavanaugh, J., dissenting) (citing Edmond v. United States, 520 U.S. 651, 663 (1997)).

134. Brief of Appellants, *supra* note 41, at 31. Although one could make an inference from their brief that Appellants would require an officer to be removable at will in order for the officer to be inferior, this premise is not explicitly stated in Appellants' brief. *Id.*

135. *Free Enter. Fund*, 537 F.3d at 707 (Kavanaugh, J., dissenting); *see also* Bowsher v. Synar, 478 U.S. 714, 726 (1986) ("Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." (quoting Synar v. United States, 626 F. Supp. 1374, 1401 (D.C. Cir. 1986))).

136. Morrison v. Olson, 487 U.S. 654 (1988).

137. *Free Enter. Fund*, 537 F.3d at 708 n.17 (Kavanaugh, J., dissenting).

138. 15 U.S.C. §§ 7211(a), (c), (f) (2006).

139. Brief of Appellants, *supra* note 41, at 32.

140. *Free Enter. Fund*, 537 F.3d at 709 (Kavanaugh, J., dissenting).

> (1) the statute expressly provides that the officer can be removed for failing to follow a supervisor's direction and supervision, or (2) the statute expressly provides that a superior officer other than the President has authority to prevent and affirmatively command, and to manage the ongoing conduct of, all of the officer's exercises of executive authority against the public.[141]

Applying this test to the PCAOB, the Challengers first observe that the for-cause restriction on removal of the members of the PCAOB poses a significant obstacle to finding the members to be inferior officers.[142] The Challengers argue that the primary reason for for-cause removal is to place PCAOB members outside the significant direction and supervision of their superiors.[143] They also contend that SOX does not provide the SEC or any other superior with any meaningful means to supervise or direct the conduct of the PCAOB members.[144] Here, the Challengers advocate that the SEC does not have the authority to affirmatively command or manage the PCAOB's conduct with respect to investigations, inspections, and enforcement actions.[145] Additionally, the PCAOB's prosecutorial authority is not subject to SEC review, and its imposition of sanctions is only subject to after-the-fact review.[146] Furthermore, the SEC's method of review of PCAOB rules through "cumbersome notice-and-comment procedures" is insufficient to constitute direction and supervision under *Edmond*.[147]

2. Violation of the Principle of Separation of Powers

The Challengers contend that the double for-cause limitation on removal of the PCAOB violates the principle of separation of powers by excessively attenuating the President's ability to control the execution of the laws.[148] The Challengers recognize that neither the Supreme Court nor any inferior court has addressed a structure in which an officer is removable only for cause by the head of a department, who in turn is removable only for cause by the President.[149] The Challengers primarily derive their separation of powers argument from Supreme Court jurisprudence on the

141. *Id.*
142. *Id.*
143. *Id.*
144. Carvin et al., *supra* note 52, at 231–32.
145. *Free Enter. Fund*, 537 F.3d at 709 (Kavanaugh, J., dissenting).
146. Brief of Appellants, *supra* note 41, at 33.
147. *Id.* at 34.
148. Brief of Appellants, *supra* note 41, at 12–13.
149. *Free Enter. Fund*, 537 F.3d at 686 (Kavanaugh, J., dissenting).

President's removal power and the lack of a similar structure among any other agency.[150] An amicus curiae brief written in support of the Free Enterprise Fund also urges unconstitutionality based on the executive branch's long-standing interpretation of the President's broad removal powers.[151] Moreover, the brief cites the harmful effects of SOX, including the sharp increase in accounting and auditing expenses, as added dangers to a judicial endorsement of the PCAOB.[152]

The underlying test to determine the constitutionality of a congressionally imposed limitation to the President's removal power requires an inquiry into whether the removal restriction "impermissibly burdens the President's power to control or supervise [an officer] in the execution of his or her duties."[153] The Challengers contend that the "seminal case" in determining the constitutionality of removal restrictions is *Myers*, in which the Court emphasized that a President's removal power over those officers "for whom he cannot continue to be responsible" is critical to the President's faithful execution of the laws.[154]

While the Challengers identify *Myers* as the most influential case in the Supreme Court's removal restriction jurisprudence, all parties recognize that any case within this area must be considered in light of *Humphrey's Executor* and *Morrison*.[155] In the Challengers' view, *Humphrey's Executor* and *Morrison* may, however, be limited to their respective holdings, neither of which expressly authorizes the double for-cause removal structure nor even acknowledges the possibility of such a structure.[156] Although *Humphrey's Executor* blessed the creation of independent agencies, the Court did not stretch its holding beyond permitting a for-cause removal restriction on concededly principal officers.[157] *Morrison*—perhaps the most pivotal case to the PCAOB—may be limited to circumstances in which the head of the department over the inferior officer is removable at will by the President.[158] The Challengers describe heads of departments that

150. *Id.* at 698–700.

151. Washington Legal Foundation Brief, *supra* note 124, at 3–5.

152. *Id.*

153. Brief of Appellants, *supra* note 41, at 14 (quoting Morrison v. Olson, 487 U.S. 654, 692 (1988)).

154. Carvin et al., *supra* note 52, at 217–18 (quoting Myers v. United States, 272 U.S. 52, 117 (1926)).

155. *Free Enter. Fund*, 537 F.3d at 694–96 (Kavanaugh, J., dissenting).

156. *Id.* at 696–97.

157. 295 U.S. 602, 628–29 (1935).

158. *Free Enter. Fund*, 537 F.3d at 696 (Kavanaugh, J., dissenting).

are removable at will as an "alter ego" of the President.[159] Because the President may remove the department head at any time for any reason, this removal structure effectively forces the officer to obey the President's authority.[160] Because the head of the department in *Morrison* was an alter ego of the President, the *Morrison* case was not one in which the President's removal power was "completely stripped."[161]

Applying these precedents to the PCAOB, the Challengers conclude that the removal restrictions on the PCAOB are unconstitutional for several reasons. As distinct from the statutes in *Humphrey's Executor* and *Morrison*, SOX "completely strips" the President's removal authority over the PCAOB because the President can remove neither the commissioners of the SEC nor the PCAOB members at will.[162] This conclusion rests on the premise that *Morrison* and *Humphrey's Executor* represent the outermost limits of permissible restrictions on the President's removal power.[163] Judge Kavanaugh acknowledged that the lack of any historical precedent for this removal structure provides evidence of the PCAOB's unconstitutionality.[164]

The Challengers also conclude that the removal restrictions, coupled with the President's lack of appointment power over the PCAOB, violate the principle of separation of powers when viewing together all of SOX's provisions governing the PCAOB.[165] The lack of a role for the President in PCAOB's appointment and the double for-cause removal restriction unduly interfere with the President's duty to execute the laws.[166] In this regard, "the whole of this statute is worse than the sum of the parts" because it provides the President with very little means to influence how the PCAOB effectuates its policies.[167]

159. Carvin et al., *supra* note 52, at 218–20.

160. *Id.*

161. Brief of Appellants, *supra* note 41, at 16–17 (quoting Morrison v. Olson, 487 U.S. 654, 692 (1988)).

162. *Id.* at 17.

163. *Free Enter. Fund*, 537 F.3d at 698 (Kavanaugh, J., dissenting).

164. *Id.* at 699.

165. Brief of Appellants, *supra* note 41, at 16–17.

166.*Free Enter. Fund*, 537 F.3d at 712–13 (Kavanaugh, J., dissenting).

167. *Id.* at 713; Brief of Appellants, *supra* note 41, at 16–17.

B. The Supporters' View: The PCAOB's Structure is Constitutional

1. SEC Commissioners May Appoint the PCAOB

Those who view SOX's provisions governing the PCAOB as constitutional—including the United States as intervenor, the U.S. District Court of the District of Columbia, Circuit Judges Rogers and Brown, and other commentators (collectively "the Supporters")—defend the congressional grant of appointment of PCAOB members to the commissioners of the SEC.[168] The Supporters rely on much of the same Supreme Court precedent on which the Challengers base their conclusions; however, they arrive at different conclusions.[169] According to the Supporters, the Court provided the basis for determining officer status in *Edmond* when it stated, "Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior."[170]

The Supporters first argue that the Challengers' emphasis on the necessity of "ongoing, day-to-day supervision" to demonstrate that an official is an inferior officer conflicts with Supreme Court precedent.[171] The Supreme Court has routinely insisted that the presence of significant authority to execute the laws marks the line between officers and non-officers as opposed to principal versus inferior officers.[172] *Edmond* and other cases illustrate that an officer may be inferior for the purposes of the Appointments Clause even when the officer's superior does not possess plenary authority over the day-to-day operations of the officer.[173]

Furthermore, the Supporters also argue that the Challengers over-rely on the removal authority with respect to its relevance in determining officer status.[174] While acknowledging the removal structure to be one factor in the determination of officer status, the Supporters unreservedly disagree that the ability of a superior to remove an officer at will is paramount to finding the officer to be

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168. *E.g.*, *Free Enter. Fund*, 537 F.3d at 676.

169. *See, e.g.*, Brief for the United States, *supra* note 123, at 25–26 (relying on Edmond v. United States, 520 U.S. 651, 662 (1997)).

170. *Id.* at 24–25 (quoting *Edmond*, 520 U.S. at 662).

171. Brief for Appellees, *supra* note 4, at 26 (quoting Brief of Appellants, *supra* note 41, at 32).

172. *Id.*

173. *Free Enter. Fund*, 537 F.3d at 672; Brief for the United States, *supra* note 123, at 25.

174. *Free Enter. Fund*, 537 F.3d at 673–74.

"inferior."[175] The Supporters rely on *Morrison v. Olson* as an indication that the superior officer's ability to remove the officer *for cause* is a factor *in favor of* the officer's inferior status.[176] They also cite cases in which the Supreme Court has authorized congressionally imposed restrictions on the removal power of principal officers.[177]

Several provisions of SOX support the position that the SEC maintains sufficient direction and supervision over the PCAOB. In this regard, the SEC has the power to review—and then modify—inspection reports and sanctions imposed by the PCAOB.[178] The SEC must approve rules promulgated by the PCAOB and may abrogate, delete, or add to them.[179] The Supporters also argue that the SEC's removal power over the PCAOB members, and the potential for the SEC to interpret this power broadly, indicates the PCAOB members' inferior officer status.[180] According to this reasoning, SOX may even provide the SEC with more oversight than was present in *Edmond* and *Morrison* because the SEC's review of PCAOB action is de novo, and because the SEC may limit the PCAOB's jurisdiction by rescinding its authority.[181] In sum, because the SEC maintains "comprehensive supervisory power" over the PCAOB, the Supporters conclude that the PCAOB members are inferior officers, and, therefore, SOX does not violate the Appointments Clause by vesting the power of appointment with the commissioners of the SEC.[182]

2. A Permissible Limitation on Removal

The Supporters base their separation of powers defense on Supreme Court precedent regarding the President's removal power

175. *Id.*

176. *Id.*; *see also* Morrison v. Olson, 487 U.S. 654, 691 (1988) (upholding for-cause removal restrictions on inferior officers).

177. *Free Enter. Fund*, 537 F.3d at 673–74; *see also* United States v. Perkins, 116 U.S. 483, 485 (1886) ("The constitutional authority in congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as congress may enact in relation to the officers so appointed.").

178. 15 U.S.C. §§ 7214(c)–(h).

179. *Id.* §§ 7217(b)(2), (5).

180. *Free Enter. Fund*, 537 F.3d at 674–75 (finding persuasive the district court's reasoning that the SEC may interpret its removal authority to include the authority to remove for negligent behavior so that the removal restrictions are not unduly severe in all circumstances).

181. Brief for Appellees, *supra* note 4, at 22–23 (relying on 15 U.S.C. §§ 7211(c)(5), 7217(c)(2) (2006)).

182. *Id.* at 19; *see also Free Enter. Fund*, 537 F.3d at 672 ("[The Commissioners] exercise comprehensive control over Board procedures and decisions and Board members.").

and Congress's authority to create independent agencies.[183] Recognizing the double for-cause limitation as an untested removal structure, the Supporters nonetheless conclude that "[t]he bulk of the Fund's challenge to [SOX] was fought—and lost—over seventy years ago when the Supreme Court decided *Humphrey's Executor*."[184] They reason that the arguments against the double for-cause limitation are more of an "attack on independent agencies generally" than a challenge to the PCAOB's specific removal structure.[185]

According to the Supporters, the Supreme Court's holding that independent agencies are constitutional demonstrates that removal restrictions on the PCAOB do not impermissibly interfere with the President's ability to carry out his constitutional duties.[186] *Humphrey's Executor* and its progeny, upholding for-cause restrictions on the removal of principal officers, certainly point in favor of the PCAOB's constitutionality.[187] Here, the Supporters argue that the Supreme Court, through its approval of independent agencies, blessed Congress's authority to create federal officers who are "nonpartisan" and "independent of executive authority."[188]

Those supporting the constitutionality of SOX's double for-cause removal limitation rely on *Morrison v. Olson*[189] and other precedent upholding removal restrictions on inferior officers. The underlying theme of this argument is that the power of removal is "incident to the power of appointment."[190] Because the text of the Appointments Clause clearly states that Congress may vest the power of appointment of inferior officers with the heads of departments, the logical corollary is that Congress may vest the removal power of these inferior officers with the heads of departments as incident to their appointment authority.[191] The Supporters view *Morrison* as upholding the constitutionality of the removal restrictions on the inferior officer

183. *Free Enter. Fund*, 537 F.3d at 685.

184. *Id.* at 679, 685.

185. Brief for Appellees, *supra* note 4, at 46 (insisting that the very purpose of independent agencies is to place limitations on the President's control over agency decisions and that agencies' personnel decisions should not require greater Presidential control than other agency decisions).

186. *Free Enter. Fund*, 537 F.3d at 679, 685.

187. 295 U.S. 602, 623 (1935).

188. *Id.* at 624–25.

189. 487 U.S. 654, 677 (1988) (upholding power of judiciary's Special Division's to appoint independent counsel).

190. Brief for Appellees, *supra* note 4, at 40 (quoting In re Hennen, 38 U.S. (13 Pet.) 230, 259 (1839)).

191. Brief for the United States, *supra* note 123, at 47.

not because Congress vested the removal power in the President's "alter ego," but rather because the Court disagreed with the contention that a for-cause restriction "unduly trammels on executive authority."[192]

Furthermore, the Supporters reason that the double for-cause removal restriction does not "completely strip[]" the President of his removal power over the PCAOB.[193] Because the President possesses the power to nominate the commissioners of the SEC and remove them for cause, the President retains some degree of influence over the PCAOB through the removal power.[194] Thus, the President maintains "indirect removal authority" such that the President may remove the SEC commissioners if a PCAOB member engaged in sufficiently serious misconduct and the commissioners refused to exercise their removal authority.[195]

Equally important to the constitutional status of the PCAOB is a determination of whether SOX's provisions governing the PCAOB collectively limit the President's ability to execute the laws.[196] The Supporters argue that, in dealing with removal limitations, the Court has emphasized not a formal but rather a functional approach designed to ensure that Congress does not interfere with the President's constitutional duty.[197] In the present case, although Congress intended some degree of independence for the PCAOB, the "vast degree of Commission control at every significant step" allows for ample accountability to the President and outweighs any constitutional concern created by the removal restrictions.[198] The Supporters also urge that this is not a case in which Congress is attempting to aggrandize its own powers at the expense of the

192. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 679 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 2378 (U.S. May 18, 2009) (No. 08-861) (quoting *Morrison*, 487 U.S. at 691).

193. *Id.* at 682–83.

194. *Id.* at 682.

195. Brief for Appellees, *supra* note 4, at 44.

196. Brief for the United States, *supra* note 123, at 49 (quoting *Morrison*, 487 U.S. at 691).

197. *Id.* The Supreme Court has stated,

> The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II.

Morrison, 487 U.S. at 689–90.

198. *Free Enter. Fund*, 537 F.3d at 683.

executive branch, as Congress does not retain control over PCAOB actions.[199]

IV. A RECONCILIATION: WHY THE PCAOB WITHSTANDS SCRUTINY UNDER THE APPOINTMENTS CLAUSE BUT NOT SEPARATION OF POWERS

The *Free Enterprise Fund* case, which will be heard by the Supreme Court during the October 2009 Term, provides an opportunity for the Court both to resolve the constitutional challenges to the PCAOB and to clarify further and expand on its Appointments Clause and separation of powers jurisprudence. This Part explains why the most consistent application of Supreme Court precedent requires a conclusion that the PCAOB's structure does not violate the Appointments Clause but does violate the principle of separation of powers. Because the SEC maintains a "veto" power over the PCAOB's most significant powers, the PCAOB members are inferior officers who may be appointed by the commissioners of the SEC. But, although the PCAOB's appointment restrictions are constitutional, the double for-cause limitation on removal should not withstand scrutiny under a separation of powers analysis. This novel removal structure both excessively attenuates the President's ability to see that the laws are faithfully executed and indirectly draws power over the execution of the laws to Congress. Furthermore, to the extent that any uncertainty remains regarding the constitutionality of the PCAOB, the Supreme Court should proceed cautiously before validating an unprecedented congressional limitation on the President's removal authority.

A. Constitutional Safeguards and Investor Uncertainty: Why These Issues Must Be Resolved

Although the Court has granted certiorari in *Free Enterprise Fund*, the case faces preliminary obstacles to the resolution of its constitutional issues.[200] A Court disinterested in dealing further with

199. Brief for the United States, *supra* note 124, at 45; *cf.* Bowsher v. Synar, 478 U.S. 714, 730–31 (1986) (holding that Congress retaining removal authority over Comptroller General violates separation of powers by giving Congress a form of control over the execution of the laws).

200. Peter L. Strauss, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 61 VAND. L. REV. EN BANC 51, 58 (2009) (noting that the Court may avoid the constitutional issues by concluding that the petitioners have not exhausted their administrative remedies, that there has been no final agency action requisite for judicial review, or that the constitutional questions are not yet ripe for judicial resolution).

the thorny constitutional challenges under the Appointments Clause and the principle of separation of powers might opt to avoid ruling on these important issues by employing the canon of constitutional avoidance.[201] As such, the Court might avoid weighing in on the constitutional issues by taking a close look at the PCAOB's jurisdictional argument and conclude that the Free Enterprise Fund failed to exhaust SOX's statutory review procedures.[202]

Both the federal district court and the D.C. Circuit found in favor of the Free Enterprise Fund on the jurisdictional issue,[203] and in all likelihood, the Supreme Court will agree with its judicial colleagues that the constitutional challenges are "collateral" to SOX's administrative review procedures. However, no matter how compelling the preliminary obstacles may be, the fundamental constitutional principles at issue and the need for clarity regarding the constitutionality of a significant regulatory agency provide compelling reasons for why the Court should resolve the constitutional issues surrounding the PCAOB when it decides the case. Judge Kavanaugh captured the magnitude of the case aptly when he stated that the dispute regarding the PCAOB "is the most important separation-of-powers case regarding the President's appointment and removal powers to reach the courts in the last 20 years."[204] This case directly bears on the balance of power between the executive and legislative branches and the concern of government accountability on which the Framers of the Constitution placed high emphasis.[205] *Free Enterprise Fund* therefore presents the perfect opportunity for the Court to clarify and expand on its prior jurisprudence regarding the Appointments Clause and the principle of separation of powers.

In addition to the constitutional principles at stake in *Free Enterprise Fund*, the case also raises concerns about a key regulatory body that possesses authority over a significant segment of the financial sector. In response to the accounting oversight failures that led to financial reporting frauds at several prominent companies,

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201. *See* Escambia County v. Macmillan, 466 U.S. 48, 51 (1984) ("It is a well-established principle . . . that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.").

202. The D.C. Circuit held in favor of the Free Enterprise Fund on the jurisdictional issue finding the constitutional challenges to be "collateral" to SOX's administrative review procedures. *Free Enter.Fund*, 537 F.3d at 671.

203. *Id.*

204. *Free Enter. Fund*, 537 F.3d at 685 (Kavanaugh, J., dissenting).

205. *See* Morrison v. Olson, 487 U.S. 654, 727 (Scalia, J., dissenting) ("The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom.").

Congress charged the PCAOB with the task of protecting investors through the oversight of corporate accounting standards.[206] While it is debatable whether the PCAOB has succeeded in reviving investor confidence, it is likely that the uncertainties surrounding the constitutionality of the PCAOB will cast a negative light on the public's perception that this regulatory body will succeed in accomplishing its congressional mandate. If the Supreme Court were to affirm the constitutionality of the PCAOB, this holding would work to bolster public confidence in this regulatory body. If the Supreme Court invalidated SOX's creation of the PCAOB, it would alert Congress of any constitutional misstep with the PCAOB and provide an opportunity for Congress to address the problem. In either circumstance, a Supreme Court resolution will clarify these constitutional uncertainties and promote the interests of investors and the general public.

B. The Inability to Render a Final Decision is Determinative of Inferior Officer Status

The few cases dealing with the distinction between principal and inferior officers indicate that the Supreme Court should not invalidate those provisions of SOX governing the appointment of PCAOB members because these members are inferior officers who may be appointed by the head of a department. The most pertinent language can be found in *Edmond*, where the Court made three definitive statements regarding the test for determining officer status. As a general premise, the Court stated that "the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: whether one is an 'inferior' officer depends on whether he has a superior."[207] The Court also stated that inferior officers are officers whose work is directed and supervised at some level by superior officers.[208] Lastly, and most importantly, is the Court's conclusion that "[w]hat is significant is that the [officers in question] have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers."[209]

These three conclusions in *Edmond*, which govern how officer status should be determined, indicate that the PCAOB members fall

206. 15 U.S.C. § 7211(a) (2006).

207. Edmond v. United States, 520 U.S. 651, 662 (1997).

208. *Id.* at 663.

209. *Id.* at 664.

on the inferior officer side of the line. It is unquestionable that the members of the PCAOB have some form of "relationship" with higher-ranking officers below the President. Given the SEC commissioners' authority to review, modify, or abrogate PCAOB duties, the SEC commissioners must be considered, to some extent, "superiors" of the PCAOB. Therefore, *Edmond* suggests that the PCAOB members at least meet the general premise of inferior officer status.

The fact that Congress granted the SEC commissioners some authority to direct and supervise the PCAOB's major functions is also significant in the determination of the PCAOB members' officer status. Although it is debatable whether the SEC commissioners possess "comprehensive supervisory authority" over the PCAOB, as the Supporters argue, the Supreme Court should not require this degree of supervisory authority to find an officer to be "inferior." Those challenging SOX's appointment provisions infer too much from *Edmond*'s purported "direct and supervise test." A close reading of *Edmond* casts serious doubt on the Challengers' contention that the requisite supervision and direction requires the SEC to "affirmatively command" the PCAOB's "ongoing, day-to-day" activities. Rather, all *Edmond* requires is that the SEC exercise *some level* of direction and supervision over the PCAOB.[210] Like the superior officers in *Edmond*, the SEC commissioners possess some form of oversight over all of the PCAOB's most significant functions, including review over inspections, investigations, the promulgation of rules, the imposition of sanctions, and budget preparation.[211] To the extent those challenging the constitutionality of SOX find any support for the requirement of a higher degree of control, this concern is alleviated by the fact that the commissioners may dismiss the PCAOB of any of its responsibilities under SOX.[212]

Although those challenging SOX may reasonably take issue with some of the vague language expressed in *Edmond*, the Supreme Court clearly gave substantial weight to the superior officers' veto power over the officers in question.[213] This significant means of control is also present in SOX, which requires the commissioners' approval before rules promulgated by the PCAOB go into effect and also grants the commissioners authority to cancel or modify any sanction imposed

210. *See id.* at 663 (concluding that " 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate").

211. 15 U.S.C. §§ 7217(b)–(d) (2006).

212. *Id.* §§ 7217(d)(1)–(2).

213. 520 U.S. at 665.

by the PCAOB.[214] Therefore, as was critical in *Edmond,* the PCAOB has "no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers."[215]

Although the presence of significant regulatory authority, which is undoubtedly possessed by the PCAOB, should play some role in determining officer status, it should by no means be conclusive. An officer's ability to exercise broad powers may be relevant in an effort to demonstrate absence of direction and supervision by any other federal officers. However, when a superior officer has a "veto power" over the officer in question, the existence of significant authority should be given little weight. As the Supreme Court recognized in *Buckley v. Valeo*, in contrast to "employees," all federal "officers"—which undoubtedly includes the members of the PCAOB—possess significant authority pursuant to the laws of the United States.[216]

Furthermore, the Challengers' contention that removal at will by a superior officer is the most important factor in finding an officer inferior conflicts with both *Edmond* and *Morrison*. *Edmond* does indicate that the power of removal is "a powerful tool for control."[217] However, nowhere in its opinion does the Court indicate that the power of removal was the most important factor in its determination. Moreover, the Court acknowledges that the power to remove, not just the power to remove at will, is a "powerful tool."[218] *Morrison* bolsters this conclusion by relying on the superior officer's power to remove the officer for good cause in reaching its conclusion that the officer in question maintained inferior officer status.[219] Therefore, the SEC commissioners' authority to remove the PCAOB members for cause should likewise count in favor of inferior officer status.

C. The Double For-Cause Removal Restriction Unconstitutionally Burdens the Executive Power

Finding the PCAOB members to be inferior officers under the Appointments Clause is far from the end of the inquiry regarding the constitutionality of SOX's provisions governing the PCAOB. Rather, the Supreme Court should find the PCAOB's removal structure unconstitutional because the congressionally-imposed restrictions on

214. 15 U.S.C. §§ 7217(b)(3), (c)(3).

215. 520 U.S. at 665.

216. Buckley v. Valeo, 424 U.S. 1, 126 (1976).

217. 520 U.S. at 664.

218. *Id.*

219. 487 U.S. 654, 671 (1988).

the President's removal power excessively encroach on the President's power to execute the laws. While the double for-cause limitation on removal is a novel structure never before addressed by the courts, the most accurate reading of Supreme Court precedent on the principle of separation of powers would deem SOX's removal restrictions unconstitutional. Several unique aspects of SOX also leave the Justices with ample room to limit their holding to the PCAOB's statutory structure without affecting other independent agencies.

The Supporters' contention that the majority of the challenge to SOX's removal restrictions was resolved over seventy years ago in *Humphrey's Executor* fails to take into account the novelty of the PCAOB's removal structure and the additional burden it imposes on the President's ability to execute the laws. Rather, as suggested by Judge Kavanaugh, the double for-cause removal restriction might better categorize this case as "*Humphrey's Executor* squared."[220] Although the Court in *Humphrey's Executor* authorized a congressionally imposed for-cause removal restriction on a principal officer, the Court explicitly concluded that the constitutionality of removal restrictions in future cases "will depend on the character of the office."[221] The Court indicated that its holding in *Humphrey's Executor* was nearing the outermost constitutional limits by expressly leaving open the constitutionality of future cases that come within the "field of doubt" between its *Humphrey's Executor* and *Myers* decisions.[222]

Like the Supporters, the Challengers overstate their position that SOX's removal restrictions on the PCAOB provide a case where the President's removal power is "completely stripped." Because the President has the authority to appoint and remove the commissioners of the SEC for cause, who in turn have the authority to remove the members of the PCAOB for cause, the President still maintains *some* degree of removal authority.[223] However, the point at which the President's removal power is completely stripped should not mark the line for the constitutionality of removal restrictions. *Morrison v. Olson* merely stated that granting the power of for-cause removal of an

220. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 686 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *cert. granted*, 129 S. Ct. 2378 (U.S. May 18, 2009) (No. 08-861).

221. Humphrey's Ex'r v. United States, 295 U.S. 602, 631 (1935).

222. *Id.* at 632.

223. An example of a case in which the President's removal power was "completely stripped" would be if Congress granted the power of removal of an inferior officer to a principal officer who could not be removed by the President.

inferior to a principal officer who was removable at will by the President did not completely strip the President of his removal authority.[224] The Court did not indicate that completely stripping the President of removal power was a necessary condition to invalidate removal restrictions.[225] Rather, "the real question" was whether the removal restrictions hinder the President's ability to fully perform his constitutional duty to execute the laws.[226]

SOX's removal restrictions on the PCAOB impede the President's ability to faithfully execute the laws. The double for-cause limitation excessively attenuates the President's control over these federal officers who are charged with a significant mandate within the executive branch. Not only does SOX place a for-cause limitation on the removal of inferior officers, but neither the President nor an "alter ego" has the ability to remove the PCAOB members if they enforce the laws in a manner in which the President strongly disagrees.[227]

Furthermore, the for-cause restriction over the PCAOB is particularly limiting. SOX limits the commissioners' for-cause removal of PCAOB members to situations in which a PCAOB member "willfully" violates his or her authority.[228] Because of the added "willful" requirement, it may be a stretch to say that the commissioners may remove the PCAOB members for any of the traditional notions of for-cause removal, which generally include "inefficiency, neglect of duty or malfeasance in office."[229] This additional restriction on removal further attenuates the President's removal authority and, consequently, his ability to faithfully execute the laws.

Considering together the PCAOB's significant authority with the restrictions on the appointment and removal of its members, the PCAOB's structure is even more offensive to the principle of separation of powers. Although not in violation of the Appointments Clause, the congressional grant of appointment to the SEC commissioners further hinders the President's ability to ensure that the officers faithfully execute the laws. SEC oversight of the PCAOB provides some degree of executive control, but the PCAOB's substantial regulatory authority over a major financial sector mandates an added degree of caution before allowing this

224. 487 U.S. at 691.

225. *Id.*

226. *Id.*

227. *See supra* Part II.C.2 (discussing the President's restricted removal powers).

228. 15 U.S.C. § 7217(d)(3).

229. Sec. & Exch. Comm'n v. Blinder, Robinson & Co., 855 F.2d 677, 681 (10th Cir. 1988).

governmental entity to wield its authority without the requisite accountability to the executive branch. Although a reasonable argument exists that Congress may not be directly aggrandizing its own powers with SOX, the principle of separation of powers works also to prevent the encroachment of one branch on another branch's powers.[230] The Supreme Court recently affirmed this view in *Loving v. United States* when it stated, "Even when a branch does not arrogate power to itself . . . the separation of powers doctrine requires that a branch not impair another in the performance of its constitutional duties."[231] Furthermore, there remains the viable argument that Congress did aggrandize its powers, albeit indirectly, through its creation of the PCAOB. Because SOX and the PCAOB owe their existence to Congress, and Congress may abolish the statute and the entity at any time, an avenue remains open for Congress to indirectly influence the PCAOB, and hence maintain some influence over the executive power.[232]

Insofar as any uncertainty remains concerning the constitutionality of SOX's provisions governing the removal of the PCAOB, the Supreme Court should proceed cautiously before heading down the "slippery slope" of validating an unprecedented congressional limitation on the President's removal authority. As discussed in Part II.C.1, the Framers considered the separation between the three branches to be one of the foremost constitutional safeguards to ensuring the government's accountability to the public. The Supreme Court previously asserted: "[T]he reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires."[233] Moreover, by crafting the executive powers in broad terms and specifically enumerating the legislative powers, the Framers clearly intended the President's power over removal, and the execution of the laws in general, to be interpreted broadly. Given the strong test to government accountability at stake in *Free Enterprise Fund*, the Supreme Court should be reluctant to permit this novel structure to pass constitutional muster without close scrutiny.

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230. Loving v. United States, 517 U.S. 748, 757 (1996) (citing United States v. Klein, 80 U.S. 128 (1872)).

231. *Id.*

232. *See* Nagy, *supra* note 4, at 1056–57 (explaining that Congress could declare the PCAOB a "failed experiment" and abolish it with more ease than it could a longstanding agency).

233. Myers v. United States, 272 U.S. 52, 116 (1926).

Finally, the unique structure of the PCAOB leaves the Court plenty of room to limit its holding, and thereby ameliorates the concern that it will invalidate other existing and future agencies through its holding. As a practical matter, the Supporters' inability to provide a single example of a governmental entity with a double for-cause removal restriction is prime evidence that the PCAOB is the only entity with this unique structure. To the extent the Court wants to leave open the possibility that two levels of removal restrictions may, in some cases, be constitutional, the Court could point to the additional provisions of SOX, such as the "willful" requirement for removal or the restrictions on appointment, to distinguish future cases. The Court could also rely on the broad powers of the PCAOB and the SEC's lack of "comprehensive supervisory power" over the PCAOB to distinguish a future statutory structure that does not hinder the President's ability to faithfully execute the laws.

V. CONCLUSION

Following the sequence of recent accounting frauds that severely distressed investor confidence in public company accounting oversight, Congress may find it necessary to create a regulatory body with some degree of substantive independence to oversee the public accounting profession. But, however desirable this end may be, Congress may not achieve this result through a means that violates fundamental constitutional principles. The Supreme Court has aptly recognized: "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."[234]

Because of the uncertainty surrounding two of the President's most essential powers and the need for clarity regarding the PCAOB's constitutional status, the Supreme Court should weigh in on the constitutional issues notwithstanding any viable preliminary jurisdictional challenges to the case. A close reading of Supreme Court precedent demonstrates that the SEC's "veto power" over the most critical powers of the PCAOB renders its members "inferior officers," which allows the PCAOB to withstand scrutiny under the Appointments Clause. This, however, is only half of the constitutional challenge. The double for-cause limitation on removal of the PCAOB provides a substantial obstacle to the President's ability to control officers within the executive branch. As a result of Congress's

234. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 950 (1983).

encroachment on the President's executive authority, the novel structure for removal of the PCAOB violates the constitutional principle of separation of powers. The ultimate decision, however, lies with the Supreme Court to determine whether it will invalidate the PCAOB and vindicate the principle of separation of powers, or whether it will uphold an unprecedented restriction on the President's removal authority and permit Congress to aggrandize its powers at the expense of the executive branch.

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